

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

No. 71

FEDERAL POWER COMMISSION, *Petitioner*,

v.

THE EAST OHIO GAS COMPANY, ET AL., *Respondents*.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.**

**Memorandum in Support of Petitions for Rehearing
Submitted on Behalf of the Louisiana Public Service
Commission, Amicus Curiae.**

*To the Honorable the Supreme Court of the
United States:*

Comes now Bolivar E. Kemp, Jr., Attorney General of Louisiana, appearing herein for the Louisiana Public Service Commission, *amicus curiae*, and submits this memorandum in support of the petitions for rehearing presented by the Respondents in the above-

entitled cause; and, in support thereof, respectfully shows:

1. The Louisiana Public Service Commission is an agency of the State of Louisiana, charged with the intrastate regulation of public utilities including natural gas companies. The Commission is greatly alarmed and concerned over the consequences of the majority decision in this cause with its resulting broadening and expansion of the authority of the Federal Power Commission, which can only have the effect of embarrassing and inhibiting effective regulation of natural gas utilities by the several states.

2. The majority opinion appears to rest primarily upon the mechanical circumstance that when respondent receives the gas from the transcontinental pipe lines of Panhandle Eastern Pipe Line Company and Hope Natural Gas Company, at points within the State of Ohio, there is no immediate reduction in the pipe line pressure, but such pressure is permitted to propel the gas through the trunk lines of East Ohio Gas Company to ultimate destination without repumping. From this the majority seems to infer that the interstate journey of the gas is not broken at the point of reception by East Ohio Gas Company, but continues to the point at which pressures are reduced for the purpose of actual service to consumers.

That this interpretation was not the intent of the Congress is made clear by the legislative history of the Natural Gas Act. One of the early bills which subsequently led to the enactment of this statute was H. R. 11662, introduced in the 74th Congress. Section 1 (b) of H. R. 11662 included a provision which exempted local distribution of gas from federal jurisdiction *only if such distribution was from low-pressure mains*. The Louisiana Public Service Commission, in concert with the other state regulatory commissions which compose the membership of the National Association of Railroad and Utilities Commissioners, protested this provision and urged that the section be amended to make it perfectly clear that any distribution to ultimate consumers, regardless of gas pressures, would be free of federal regulation and subject to regulation by the states. This is reported at Page 91 of the Printed Hearings on H. R. 11662, 74th Congress.

As a result, in subsequent bills (namely, H. R. 12680 of the 74th Congress, H. R. 4008 of the 75th Congress, and H. R. 6586 of the 75th Congress) all reference to gas pressures was eliminated from what eventually became Section 1 (b) of the Act. The Committee, which finally rendered a favorable report on H. R. 6586, very lucidly stated its conception of the

purpose of this litigation. We quote from the Committee's report (Report No. 709, 75th Congress, 1st Session):

"The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State Regulation. (See *Pennsylvania Gas Co., v. Public Service Commission* (1920) 252 U. S. 23.) *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.* However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924) 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927) 273 U. S. 83) *The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.*" (Emphasis supplied.)

That the Congress had in mind the so-called "Cooley" principle which was enunciated in the Pennsylvania Gas Company case above referred to cannot be seriously questioned; and the deliberate deletion of all reference to gas pressures in Section 1 (b) indicates

that the Congress did not intend that gas pressures should have any relevance whatever in determining the status of gas companies under the Act, or in delineating the extent of the Federal Power Commission's jurisdiction.

3. That the East Ohio Gas Company is a distributing company is equally beyond question. It makes no wholesale sales. Each of its customers consumes the gas he purchases. To say that East Ohio Gas Company's operations cover a large part of the State of Ohio, and it is therefore not a distributing company within the meaning of the Act, is to make mere size a criterion; and it is respectfully submitted that the character of this company is to be determined by its function and not by the area that its operations cover.

4. As Mr. Justice Jackson's dissenting opinion points out, the purpose of the Natural Gas Act was to supplement but not to supplant state regulation; and, as he states, "What the Power Commission asks the Court to do today is not to fill a gap in the states' power to regulate, for there is none, but to create a gap in order to make room for federal power."

CONCLUSION

It is respectfully urged that the petitions for rehearing be granted and that the decree of the United

States Court of Appeals for the District of Columbia Circuit be, upon further consideration, affirmed.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General of Louisiana.

JOHN L. MADDEN,
*Assistant Attorney General
of Louisiana,*
Attorneys for Louisiana Public
Service Commission, *amicus
curiae.*

CERTIFICATE OF COUNSEL

I, one of the attorneys for the Louisiana Public Service Commission, *amicus curiae*, do hereby certify that the foregoing memorandum in support of the petitions for rehearing in this cause is presented in good faith, and not for delay.

JOHN L. MADDEN,
*Assistant Attorney General
of Louisiana,*
Attorney for Louisiana Public
Service Commission, *amicus
curiae.*